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DATO' KHALID HJ AHMAD

v.

DATO' SERI ABDUL RAHMAN MAIDIN

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HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[SUIT NO: D6-22-1-2005]
10 DECEMBER 2010

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CONTRACT: *Sale and purchase of shares - Failure to pay balance price - Whether defendant could escape liability to pay balance purchase price on ground of misrepresentation - Whether misrepresentation proven - Whether plaintiff registered and beneficial owner of shares - Whether plaintiff capable of passing good title*

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The plaintiff brought the instant action against the defendant to recover the balance of monies owing to him from the sale of his 5% shareholding in a company ('Realmild'). Apart from his share-purchase transaction with the plaintiff, the defendant had spent RM40 million to acquire the rest of the shares in Realmild. The plaintiff contended that

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although a letter of indebtedness drafted by the defendant stated that the latter owed the plaintiff RM10 million, the agreed sale and purchase price for the shares was RM15 million out of which the defendant had only paid RM5 million. Apart from asserting the agreed price was as stated in the letter, the defendant denied the plaintiff's claim altogether on the ground of misrepresentation and relied on that same ground in

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his counterclaim to ask for a refund of the monies he had already paid to the plaintiff for the shares. The defendant claimed that the plaintiff had at all material times before he entered into the share sale contract represented that he was the absolute owner of the 5% shares in Realmild. The defendant alleged that the plaintiff actually held the shares

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as nominee for a political party, which was the true owner of the shares. The plaintiff denied this allegation asserting that he was the true owner of the shares and that the defendant's defence and counterclaim was an afterthought. It was undisputed that the plaintiff's shares had been registered in the defendant's name.

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Held (allowing plaintiff's claim and dismissing defendant's counterclaim):

(1) The court was satisfied that the plaintiff was not only the registered but also the beneficial owner of the 5% shares held by him at the

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material time. As owner of the shares, the plaintiff did pass a good title to the defendant. The principle of *nemo dat quod non habet* (a person cannot give what he does not have) therefore did not arise. Also the issue of misrepresentation, fraud or mistake did not arise. (paras 15, 26 & 27)

(2) Even if the plaintiff's shares were not his absolutely, the conditions for avoiding the agreement on the ground of misrepresentation had not been established. The matters raised by the defendant did not amount to misrepresentation whether fraudulent, negligent or innocent. There was also no fraud or mistake. (paras 27 & 38)

(3) The defendant was not a novice but an established corporate player who must have satisfied himself as to the important issues of ownership and price of the shares before handing over the money. Given his familiarity with the corporate world and the importance of due diligence and verification before parting with such substantial sum of money and embarking on such a large venture, it would be correct to assume the defendant must have asked the appropriate and necessary questions or clarifications. (paras 30 & 32)

(4) The explanations of the plaintiff with regard to the letter of acknowledgement of indebtedness and his subsequent actions and conduct in relation to collecting the balance of monies from the defendant was both adequate and reasonable. There was more than sufficient cogent evidence to support the plaintiff's contention that the price for his shares was indeed RM15 million of which only RM5 million had been paid and there was RM10 million still due and outstanding from the defendant. (paras 42 & 44)

Case(s) referred to:

Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd [2010] 7 CLJ 152 CA ***(refd)***

Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ (Supp) 147 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Zakaria Daud v. Siti Hussin & Ors [2004] 1 CLJ 844 CA ***(refd)***

For the plaintiff - Ahmad Fadzil Mohd Perdaus; M/s Shamshuddhuha Ho & Partners
For the defendant - Alex De Silva (Eugene Jayaraj Williams with him); M/s Rueben Williams

Reported by Ashok Kumar

JUDGMENT

Mary Lim J:

[1] This is a claim for the balance of monies due from a sale of shares. The principal defence is misrepresentation. That defence also forms the basis upon which a counterclaim has been made for a refund of the money already paid for the purchase of the shares.

A **Plaintiff's Case**

[2] The plaintiff testified that he was a director and shareholder of a company known as Realmild Malaysia Sdn Bhd (Realmild). He owned 355,050 shares which represented 5% of Realmild's shares. This was how he came to hold that 5% shares in Realmild.

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[3] In 1992, the plaintiff was the Managing Director of the New Straits Times Press (NSTP). At that time, his friend, Dato' Nazri Abdullah (PW2) was the Group Editor of the Bahasa Malaysia newspapers in NSTP while Datuk Kadir Jasin was the Group Editor of
C the English newspapers in NSTP; and Encik Mohd Noor Mutalib was the Senior Group General Manager Production and Circulation of NSTP. In late 1992, PW2 formed Realmild to take over the controlling stake in NSTP and Sistem Televisyen Malaysia Berhad or TV3 through a company known as Malaysian Resources Corporation Berhad
D (MRCB). Together with the plaintiff, Datuk Kadir Jasin and Encik Mohd Noor Mutalib, PW2 raised RM800 million for what was in effect a buy-out of MRCB. The largest shareholder of Realmild was PW2. He held 80% of Realmild's shares. He also paid for the plaintiff's 5% shares in Realmild and gave that 5% to the plaintiff. The plaintiff claimed that
E when PW2 gave him the shares, he told him that the 5% shares were his.

[4] Around July 1999, the defendant was poised to take over the management of MRCB. Because the majority block of MRCB's shares were held by Realmild, the defendant set about buying up Realmild.
F The plaintiff testified that the defendant approached him and offered to buy his 5% shares for RM5 million. The plaintiff rejected it because he felt that the price was too low. He had pegged the value of his 5% shares at RM30 million having regard principally to MRCB's net tangible assets (NTA) and the fact that at that time, MRCB
G was involved in various projects including the KL Sentral project. After negotiations, the plaintiff purportedly gave the defendant a 50% discount of the initial price, agreeing to sell for RM15 million. The defendant is said to have agreed to this revised figure and he had a written agreement drawn up.

H **[5]** However, the plaintiff refused to sign that prepared agreement when he found the price of the shares stipulated in the agreement to be RM10 million and not the RM15 million that was supposedly agreed. He claimed to have refused to reduce the purchase price. The defendant who was said to be keen that the agreement be signed since it had
I already been prepared then proposed that a debit note be issued for the RM5 million representing the difference between the two prices. The plaintiff also rejected this proposal. He claimed that his refusal was also due to his concern that the defendant would be "actually committing a crime because it was a related party transaction".

[6] Thereafter, the defendant made a payment of RM5 million. At para. 7.2 of the statement of claim, the plaintiff alleged that the payment of RM5 million was a part-payment of the price of RM15 million and "kesan daripada ini, defendan telah khususnya pada waktu yang material memperakui akan harga jualan sebanyak RM15,000,000 dan baki masih terhutang sebanyak RM10,000,000". *Vide* letter dated 19 July 1999, the defendant is said to have acknowledged an indebtedness of RM10 million. In that letter, the defendant is also said to have agreed and promised to settle the sum of RM10 million by way of two instalments; the first sum of RM5 million was to be settled within 14 days from the date of acknowledgement and the second instalment to be paid within 30 days after the lapse of 12 months from the date of the letter. The defendant has not settled any part of the remaining RM10 million despite repeated demands. The present claim is for that sum of RM10 million.

Defendant's Case

[7] According to the defendant, while it was true that he wanted to take over MRCB through Realmild and that he had set about doing so by buying up Realmild's shares including those held by the plaintiff; he had always understood that the lot of shares that he had purchased from the plaintiff was absolutely owned by the plaintiff. With the purchase, the plaintiff's shares were transferred to the defendant on 26 July 1999. This is the defendant's testimony on how he came about acquiring Realmild.

[8] In Q & A 2 of his witness statement, this is the defendant's answer to his counsel's question:

> Q : Can you briefly explain the background as to how you became involved with MRCB?
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> A : Sometime in 1999, I was approached by Tun Daim Zainuddin ("Tun Daim"). Tun Daim asked me whether I was interested in taking charge of MRCB by undertaking and completing a management take-over of MRCB. Tun Daim knew me from my time as Chairman of the Penang Malay Chamber of Commerce. I expressed a keen interest to take up this challenge. Tun Daim told me that he would leave the mechanics and means of achieving control of MRCB to me. I readily accepted this opportunity as this was a major career advancing move in my opinion. It was my understanding that this was a pure corporate exercise.

He then proceeded to acquire all the shares of the plaintiff, PW2 and Mohd Noor Mutalib and he did so over a period of a few days. The shares concerned were then registered in his name on 26 July 1999. In respect of those held by Datuk Kadir Jasin, the shares were

registered in the defendant's name on 30 August 2000. Negotiations for the purchases were said to be not difficult as the defendant was "under the impression that the former shareholders accepted that they had to leave and make way for me." Specifically, with regard to the plaintiff's block of shares, he approached the plaintiff and negotiated for the purchase. He claimed that the plaintiff represented to him that his shares belonged to him absolutely and that the purchase price was agreed at RM10 million to be paid in two instalments. He made the first payment of RM5 million within 14 days from 19 July 1999 that is, on 1 August 1999. The second payment of RM5 million was to be paid within 30 days after the period of 12 months from 19 July 1999.

[9] At the end of 2001, he was summoned to meet Dato' Seri Dr Mahathir Mohamad, the then Prime Minister of Malaysia and Tan Sri Nor Mohamad Yaakop. According to him, Dr. Mahathir "informed and instructed me to transfer all of the 7,101,001 Realmild shares registered under my name to Dato' Seri Syed Anwar Jamalullail ("Syed Anwar") without any consideration effective from 12 January 2002". At that meeting, he was also told by Dato' Seri Dr. Mahathir that all those shares that had been registered in his name "belonged to UMNO". He "was extremely shocked" as he "never at any time knew that UMNO were the true owner of the shares". As far as he was concerned, he "undertook the acquisition of the Realmild shares purely from a corporate and commercial standpoint" and that this was "the first time" that he "became aware of this "UMNO trust" on the Realmild shares".

[10] On 8 January 2002, the defendant wrote to the Prime Minister confirming his instructions for him to transfer ownership of all the shares to Dato' Seri Syed Anwar Jamalullail without consideration. In the same letter, he decided to state "for the record" that he had no previous knowledge of the "UMNO trust" over the Realmild's shares and that he had "paid in aggregate RM40 million in cash to the previous shareholders of Realmild in consideration of taking over the shares in Realmild". When he spoke to the Prime Minister about his payment of the RM40 million, he was told that "there was no reason" why he had to pay the money "when the shares never belonged to the individuals concerned when the shares belonged to UMNO. Therefore, he said no payment will be made to me because the shares always belonged to UMNO".

[11] The defendant then met up with the plaintiff who "did admit to me that he was aware of UMNO's ownership over the Realmild shares. He however, took the position that the UMNO ownership did not apply to the 355,050 shares he sold to me". The defendant "refused to accept this" but decided to "abide by" the instruction and proceeded to transfer all his shares to Dato' Seri Syed Anwar Jamalullail without consideration

on 12 January 2002. This was confirmed by Dato' Seri Syed Anwar Jamalullail (DW2) who testified that he too later transferred all the shares held by him to one Abdul Rahim Abd Rahman; also without consideration.

[12] The defendant claimed that the sum effect of these matters is that the plaintiff was really only a nominee who did not possess good title to the shares to enable him to transfer title in those shares to the defendant. As a result of the plaintiff's failure to pass good title and misrepresentation as to ownership of the shares, the defendant counter-claimed for a declaratory order that the letter of acknowledgement of debt dated 19 July 1999 was revoked and unenforceable; and sought a refund of the RM5 million that he had paid the plaintiff. In his defence to the counterclaim, the plaintiff denied the allegations as identified and reiterated his ownership in the shares. In the main, the plaintiff argued that this contention of the defendant was more in the nature of an after-thought.

Submissions Of The Parties

[13] It was the first submission of Mr Alex De Silva, learned counsel for the defendant that the plaintiff's claim for the balance sum of RM10 million must fail because he had failed to prove his pleaded case. According to learned counsel, there are five essential facts and ingredients in the plaintiff's pleaded case:

(i) at the defendant's request, the plaintiff agreed to sell the plaintiff's shares in Realmild for RM15 million;

(ii) the defendant agreed to pay RM15 million to the plaintiff for the shares;

(iii) the defendant paid a sum of RM5 million to the plaintiff as part payment of the purchase price of RM15 million;

(iv) after making that payment of RM5 million, the defendant executed an acknowledgement of debt date 19 July 1999 which acknowledged that the defendant still owed the plaintiff the sum of RM10 million;

(v) the shares were duly transferred to the defendant by the plaintiff.

[14] Of these five essential facts and ingredients, learned counsel submitted that only the last fact or ingredient was proved as it was not disputed. The others remained unproven after trial. Mr De Silva contended that since the plaintiff had himself testified that the acknowledgement of indebtedness dated 19 July 1999 was executed before and not, as pleaded, after the RM5 million was paid, then it must mean that the RM5 million was paid pursuant to the acknowledgement.

The plaintiff's subsequent letter of 11 August 1999 where he expressed his gratitude for the defendant's "timely" payment is said to have confirmed this. All this runs contrary to the pleaded case which is therefore not proved. Consequently, the defence need not even be considered - *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147. Mr De Silva further submitted that if the plaintiff is unable to prove the existence of an agreement to sell the shares for RM15 million, the court cannot proceed to award any lesser sum since there is no alternative claim; in which case it was submitted that the whole of the plaintiff's claim must fail. To do so would be to intervene in pleadings and to run contrary to the pleaded case and the evidence adduced at trial - *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42.

[15] In the event the court is not with him, Mr De Silva submitted that the defence is two-fold and as identified above, that there has been misrepresentation; and the application of the fundamental principle of *nemo dat quod non habet*; a person cannot give what he does not have; generally known as the '*nemo dat rule*'. Specifically, this is how the issue of misrepresentation is pleaded. At para. 4 of the defence, the defendant alleged that the plaintiff "telah menyatakan dan menyakinkan defendan bahawa plaintif mempunyai 5% pegangan saham di syarikat Realmild". Details of the related allegations and particulars of the misrepresentation and how it arises can be found at para. 12.1:

(a) Defendan telah memasuki perjanjian dengan plaintif bersandarkan persefahaman nyata bahawa untuk mendapatkan hakmilik penuh 5% saham di syarikat Realmild kepunyaan plaintif, plaintif akan dibayar jumlah harga pembelian sebanyak RM10,000,000;

(b) Plaintif telah secara jelas menyatakan dan menyakinkan defendan bahawa 5% saham Realmild tersebut adalah kepunyaan plaintif sepenuhnya dan akan dipindah milik kepada defendan apabila defendan membuat bayaran;

...

(j) Defendan menyatakan bahawa plaintif telah pada setiap masa mengetahui berkenaan "Amanah UMNO" (UMNO Trust) ke atas saham-saham Realmild dan telah gagal untuk memberitahu perkara ini kepada plaintif;

(k) Plaintif mengetahui bahawa pemilik sebenar saham-saham tersebut adalah UMNO dan bahawa saham-saham tersebut diarahkan untuk dipindah-milik pada bila-bila masa berdasarkan arahan-arahan daripada pemimpin UMNO;

(l) Plaintif telah pada setiap masa material mengetahui bahawa beliau memegang saham-saham tersebut di bawah amanah untuk UMNO;

(m) Plaintif telah membuat representasi kepada defendan bahawa saham-saham tersebut adalah kepunyaan beliau dan telah memasuki transaksi perjualan saham-saham tersebut dengan defendan.

[16] In essence, the allegations are that the plaintiff knew but failed to inform the defendant at the material time, the following matters:

i. the existence of an "UMNO Trust";

ii. that the shares that were the subject-matter of the agreement between the plaintiff and the defendant were in fact owned by UMNO;

iii. that these shares could be instructed to be transferred at any time by the leaders of UMNO;

iv. that the plaintiff knew that he was holding these shares on trust for UMNO.

[17] Instead of informing the defendant the above matters prior to or at least at the time of contract, the plaintiff represented to the defendant that he was the absolute owner of the 5% shares in Realmild held by him; and that he will transfer his shares to him upon payment by the defendant. The defendant claimed that these representations or statements were also made by the plaintiff with the intention of or has the effect of inducing the defendant into entering into the agreement to buy those shares - see *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd* [2010] 7 CLJ 152. Mr De Silva argued that the misrepresentation was established through the evidence on how Realmild was formed, operated and how the shares were subsequently transferred.

[18] In summary, Encik Ahmad Fadzil bin Mohd Perdaus, learned counsel for the plaintiff on the other hand urged the court to consider the two primary issues in this case instead of approaching the matters at hand in the manner proposed by the defendant. Those two primary issues being whether the agreement to sell the plaintiff's shares has been vitiated by misrepresentation, fraud or mistake of fact; the other concerns the balance price. Details of the plaintiff's contentions will be addressed in my findings.

Findings Of The Court

[19] With respect to learned counsel for the defendant, it would not be correct to approach the claims in the manner proposed by him, as that would be both piece-meal and artificial. In view of the pleadings, nature of the claim and counterclaim, issues identified, evidence led and the

submissions made, it is only appropriate that the matter of the ownership of the shares which the plaintiff had sold to the defendant be resolved first. After all, this matter lies at the heart of the whole claim and counterclaim. Both the claim and counterclaim must be viewed and evaluated as a whole as they are so intertwined with each other. And, in determining this matter, the question as to whether there has been misrepresentation by the plaintiff as to his ownership will invariably be addressed. If there is indeed misrepresentation, fraud or mistake as alleged, then the agreement may be avoided, regardless of the price.

[20] Towards this end, the Court of Appeal had reminded in *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413, that the proper approach to the interpretation of private contracts is to apply an objective approach in order to determine the intention of the parties at the time of contract. This being an oral contract, the testimonies of the contracting parties and the witnesses they call to testify are important in establishing the position of the parties, ownership of the shares and, what exactly was agreed between the parties.

Ownership Of The Shares

[21] As far as the question of the ownership of the shares in Realmild is concerned; especially the 5% held by the plaintiff, much time was spent during the trial examining the plaintiff's ability or otherwise in the setting-up, management and financial status of Realmild and MRCB as well as the co-relation of these two companies. The plaintiff and PW2 were cross-examined extensively on these matters. The intent being to show that PW1 and PW2 and the other two directors who set up Realmild could not have done so without the patronage of UMNO; that from evidence of the huge contracts and loans given to Realmild and MRCB, these companies were really owned by UMNO; and, because the plaintiff and the other directors were not really corporate players but media men put in these two companies by the then Finance Minister, and who had no control over these companies but further took and acted upon instructions from the "top leadership in UMNO"; these persons were really only holding the relevant shares as nominees of UMNO.

[22] It will be noted that all this evidence offered concerning Realmild and MRCB, their operations, financial arrangements and the way shares in Realmild were transferred from the defendant to DW2 and again its subsequent transfers, each occasion without consideration; and how instructions from the top leadership were carried out without question are, circumstantial. As mentioned earlier, the defendant sought to establish that the plaintiff and the other directors or shareholders involved at the material time could not have done what they did but for the fact that they were nominees for UMNO. There is no direct

evidence on the plaintiff and certainly not of PW2 being a nominee. The persons who purportedly gave the instructions were not called to testify. Apart from the defendant and DW2, the defendant called one Ahmad Hady Shahrom (DW1), Company Secretary of Realmild to testify on the "ultimate owner" of the shares of Realmild. He however testified that he could only "confirm the share ownerships as appears in the Register of Transfer as I'm not privy to other information". In answer to some additional questions asked by the defendant's counsel, DW1 denied having confirmed at a meeting with the solicitors of the defendant prior to coming to court that the "true owner" or "true beneficial owner" of the shares in Realmild was in fact UMNO. This witness was not cross-examined by the plaintiff's counsel.

[23] In my judgment, these matters raised by the defendant do not really deal with the subject shares held by the plaintiff. While there may or may not have been this patronage or assistance, regardless of its degree or extent; it does not necessarily answer the ownership of the plaintiff's 5% of Realmild's shares. For that, one must go back to the beginning when and how the shares came to be allocated to the plaintiff. Other than the evidence of the plaintiff himself, the evidence of PW2 is vital as he was instrumental in the setting up of Realmild. The defendant has however, urged this court to disregard PW2's evidence because he had "an axe to grind". In this regard, I find that while PW2 was at times somewhat strong in some of the words used to describe his feelings; it does not necessarily mean that his evidence ought to be disregarded; and certainly not in total. PW2's evidence remains cogent and credible evidence particularly in relation to how Realmild was set up. Actually, from the evidence given by both PW1 and PW2, it is evident that the circumstances of how and why Realmild was set up are really not in dispute. Furthermore, PW2's evidence does not ignore the role of UMNO, the existence of another entity in Realmild or MRCB; or the existence of a trust.

[24] PW2 gave clear evidence as to how it all began. This was his testimony. He informed the court that he was called by the then Minister of Finance, Dato' Seri Anwar Ibrahim who briefed him that the government wanted to create more Bumiputera entrepreneurs. Other than opportunities, no shares or support would be given to these young entrepreneurs. PW2 was asked by Dato' Seri Anwar Ibrahim to form a new company which will carry out a management buy-out of the NSTP Group of companies from the Renong Group. At PW2's behest, three other persons were brought in, namely Mohd Noor Mutalib, Dato' Kadir Jasin and the plaintiff. As lead, PW2 held 80% of the shareholding in Realmild while Mohd Noor Mutalib held 10%; and both Dato' Kadir Jasin and the plaintiff each held 5%. According to PW2, he held the

largest share because 70% of it was in trust for Dato' Dr Seri Mahathir Mohamed while 10% was his own. The 70% was held under Dato' Dr Seri Mahathir Mohamed's own personal name because UMNO was not supposed to hold any shares. There is purportedly a trust deed for all this arrangement. A copy of the trust deed was given to Dato' Dr Seri Mahathir Mohamed, another to Dato' Seri Anwar Ibrahim while one was kept by PW2. However, none was produced at trial. PW2 claimed he had given his copy to Datuk Kadir Jasin. Realmild then purchased the NSTP Group from the Renong Group for RM800 million and MRCB from the Hong Leong Group.

[25] PW2 was also cross-examined extensively on the financing for the setting-up of Realmild as well as the subsequent take-over of NSTP and MRCB. According to him, he had utilized RM100,000 of his own money and money from his successful trading in the share market for the initial capital of Realmild. When the share capital of Realmild was enlarged, external borrowings from a consortium of banks, some of which involved the plaintiff as guarantor, was sought. Most importantly, he also testified and confirmed PW1's evidence that he was the person who had paid for and given the plaintiff his 5% shares.

[26] Pausing here for a moment, I observe that a critical fact has emerged from PW2's evidence. It would appear that his terms that a portion of the shares be retained by himself and the other directors including the plaintiff, had been tacitly approved or agreed to by the then Finance Minister when the proposal was first discussed. There is no rebuttal evidence on this aspect and that is crucial towards determining the issue of ownership in the 5% shares. Even if there was a trust, be it for UMNO or Dato' Dr Seri Mahathir Mohamed, this is immaterial as the court is concerned here only with the plaintiff's 5% shares and not the rest of the shares in Realmild. For this, the conditions prevailing at the setting-up of Realmild are relevant.

[27] I find that despite the extensive cross-examination, the evidence of both the plaintiff and PW2 remain unshaken. I have no reason to reject their explanations as to the plaintiff's ownership of his shares. As he had explained in his letter dated 17 July 2002 to the then Prime Minister, he had regarded his 5% shares as "the motivational value" of all his efforts in relation to Realmild. I am therefore satisfied that the plaintiff was not only the registered but the beneficial owner of the 5% shares held by him at the material time. The circumstances surrounding the defendant's purchase and the subsequent disposal of his shares are entirely different from when the plaintiff first assumed and held the shares. The plaintiff's lot of shares came about from the inception of Realmild while the defendant took over from an on-going concern. It is

inappropriate for the defendant to use the conditions and circumstances of 2002 as the basis of his allegations that the plaintiff did not own his shares at the material time. As owner of the 5% shares, the plaintiff did pass good title to the defendant. The principle of *nemo dat* therefore does not arise. Since the plaintiff was the owner of his shares, the issue of misrepresentation, fraud or mistake actually does not arise.

Misrepresentation

[28] Even if the plaintiff's shares are not his absolutely, I am not satisfied that the conditions for avoiding an agreement by virtue of misrepresentation have been established. These are my reasons. It goes without saying that the representation must be untrue for it to be a misrepresentation. In *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227, the Court of Appeal defined the term "misrepresentation" as "merely descriptive of a false pre-contractual statement that induces a contract or other transaction":

> Now, it is trite that the expression "misrepresentation" is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of a mind that is free of deceit and inadvertence. See, *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd.* Put another way, a misrepresentation is innocent "where the representor believes his assertion to be true and consequently has no intention of deceiving the representee". (Cheshire & Fifoot, *Law of Contract* 6th edn.) It is the particular state of mind of the representor that determines the nature of the remedy available to the representee. So, if the misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages flowing from the fraudulent inducement.

[29] The state of mind of the plaintiff at the material time is only relevant insofar as to describe the misrepresentation as innocent, fraudulent or negligent. Such identification serves to determine the type of relief available. Most importantly, the statement or representation of the plaintiff must have been relied on by the defendant; and at the time of entry into the agreement the plaintiff must have the "intention, or at least realise, that the statement will, or probably will, be relied upon by the" defendant - *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd*, *supra*, at 162. In *Zakaria Daud v. Siti Hussin & Ors* [2004] 1 CLJ 844, Gopal Sri Ram JCA (as he then was) opining the decision of the Court of Appeal in a claim where mistake was raised made a highly pertinent remark that must be borne in mind when dealing with commercial claims and where mistake, or even misrepresentation is raised:

A Now, the principles governing a case such as the present are very well settled. They were settled as long ago as the 18th century. In *Shelburne v. Inchiquin* [1784] 1 Bro. Counter-claim 338, Lord Thurlow held that the evidence in support of the proof of common mistake should be irrefragable. In other words it should be cogent and must meet a very high standard of proof. The rationale behind this requirement is not
B difficult to discern. The transaction entered into between the parties and by the documents executed between them voluntarily and for good and valuable consideration are not to be set aside by the court wily nily for the slightest reason. Were it so, the law would be riddled with uncertainty and commerce will come to a standstill.

C **[30]** Those words of caution ring true in the facts of this case. There are several factors that lay against the defendant. First and foremost, the manner and circumstances under which the defendant himself was brought into the picture is quite telling. According to the defendant's own evidence, sometime in 1999, he was approached by Tun Daim
D Zainuddin who asked him whether he was "interested in taking charge of MRCB by undertaking and completing a management take-over of MRCB". The defendant was told by Tun Daim "that he would leave the mechanics and means of achieving control of MRCB to me". In his opinion, "this was a major career advancing move" and so he "readily
E accepted this opportunity". It was also his understanding that "this was a pure corporate exercise".

[31] From what the defendant has himself described as "purely from a corporate and commercial standpoint", it would be reasonable and certainly prudent for a businessman or corporate player such as the
F defendant who was at one-time President of the Malay Chamber of Commerce, to expect the defendant to verify any representation made by the plaintiff and ask appropriate and necessary questions as to the plaintiff's ownership of the shares at the material time, particularly in the matter as important as to the plaintiff's ownership in the 5% shares in
G Realmild. The amount involved was substantial and certainly, Realmild was a significant and important company, having regard to its other subsidiaries and related companies such as MRCB, TV3 and the NSTP Group. As a businessman and as explained by the defendant himself, the whole transaction or deal concerning Realmild and MRCB was a
H commercial exercise. The defendant is not a novice but an established corporate player who not only must have but may reasonably be expected to have satisfied himself as to the important issues of ownership and price before handing over the money. If he did not, he has only himself to blame. This is how commerce operates and to allow the allegations made without irrefragable proof would to my mind,
I render the wheels of commerce "to a standstill".

[32] Further, aside from the oral evidence, the contents of the defendant's letter to the Prime Minister at that time are insightful and must be examined. Much time was in fact spent during the trial pouring over letters sent by both parties to the then Prime Minister.

[33] In his testimony, the defendant said that he first learnt of UMNO's ownership of the shares when he was summoned to meet with the then Prime Minister and Tan Sri Nor Mohamad Yaakop. At that meeting, he was "informed and instructed to transfer all" his shares to DW2 without consideration. After confronting the plaintiff who denied that he was not the owner of the 5% shares held by him, the defendant found himself with two versions of the position of ownership. He chose to believe the Prime Minister and he transferred all his shares to DW2 without consideration. The defendant's letter dated 8 January 2002 to the then Prime Minister was *inter alia*, to put on record his awareness for the first time of UMNO's relationship and the existence of a trust in the shares in Realmild. But, it is noted that even at this point in time, the defendant did not complain, or make any claim or allegation against the plaintiff. All that he wanted to do was to put on record that he "truly and honestly believe that I am the beneficial owner of Realmild at the onset of the takeover"; and that he had "no previous knowledge of the "trust" over the shares in Realmild". In as much as the plaintiff must have been aware of the involvement of UMNO or others in Realmild and MRCB, it would be reasonable to say the same of the defendant. Perhaps, even more so since he was approached by Tun Daim to take over MRCB/Realmild and later when summoned by the then Prime Minister and Tan Sri Nor Mohamad Yaakop and directed to transfer all his shares in Realmild without consideration to DW2. Given his familiarity with the corporate world and the importance of due diligence and verification before parting with such substantial sums of money and embarking on such a large venture, it would be correct to assume that he must have asked some questions or sought some clarification.

[34] Then, there were the two letters sent by the plaintiff on the 17 July 2002, one to the Prime Minister, the other to the defendant himself. The defendant never responded to either of these letters. Such conduct is not in keeping with the allegations raised by the defendant today. In any case, the defendant was already in breach of his agreement with the plaintiff as the remaining payments were already due.

[35] It was also open to the defendant to insist on consideration before his transfer of the shares to DW2 but he chose not to. While that is entirely within his prerogative, it is clear that he made that option after having checked with the plaintiff. In these conditions, he cannot now complain.

[36] Insofar as DW2 is concerned, his testimony is peculiar to his involvement and arrangement with Tan Sri Nor Mohamad Yaakop. Nothing turns on this evidence. It is of no real assistance to the defendant's allegations of misrepresentation and plaintiff's status as nominee holder in the shares in Realmild. DW2 testified that he was mandated by Tan Sri Nor Mohamad Yaakop, the Minister of Finance two at that material time, to turn around MRCB and for that, he took over the shares of Realmild from the defendant. He did not pay for the shares and neither did he receive any when he subsequently relinquished the shares to Dato' Abdul Latif Abdullah. It was his evidence that the shares were impliedly UMNO's and that he could have dealt with the shares held by him then "if I wanted to". But since his mandate was to turn MRCB and Realmild around, it would appear the issue never arose. According to him, "once I'm given an instruction, I follow the instruction". So, when he was to relinquish the shares and MRCB and Realmild had "turn around", he had no problem when "asked to go".

[37] What strikes me here is the fact that the defendant enjoyed uninterrupted rights that accompanied his ownership of the shares for a considerable period of time. From the defence and the defendant's testimony, it can be seen that the defendant questioned the ownership of the plaintiff's 5% lot of shares only as a result of subsequent events; specifically when he had to relinquish all his shares in Realmild to DW2 for no consideration. That put him out by RM5 million where the plaintiff was concerned or a total of RM40 million from the whole transaction. Up until then, the issue did not arise and for some two odd years, the defendant dealt with and enjoyed all 7,101,001 shares in Realmild, as would any other owner of shares. As a result of this purported loss of RM40 million, or in the case of the plaintiff, RM5 million, the defendant alleged that the plaintiff had misrepresented to him that he was the owner of the shares when he was not. The plaintiff who took offence of the suggestion that his 5% shares were not his and told the defendant *vide* his letter to the defendant dated 17 July 2002 that "In fact you should ask for your first payment back if the shares were not mine". Despite this, the defendant took no steps towards enforcing his rights until the present suit was filed. In this respect, it is somewhat puzzling and at the same time incongruous that the defendant has only chosen to pursue recovery of his RM5 million and not all of his RM40 million. Following from his evidence and case, all the shares in Realmild are actually UMNO's and not just the plaintiff's lot.

[38] Above it all is the important fact - even in his allegations of misrepresentation, the defendant is not saying that he would not have purchased the plaintiff's shares if he was made aware that the plaintiff was selling as nominee holder of the shares. The defendant is simply saying that the plaintiff misrepresented himself as the owner of the

shares in question. That, to me, is insufficient. To be sustainable, the misrepresentation must be to a material fact which had induced the defendant to enter into the agreement; or but for the fact the defendant would not have contracted with the plaintiff, that the defendant relied on the representation by the plaintiff. Given that it was the defendant who first approached the plaintiff and not the other way round, that allegation is difficult to accept. By this time, the defendant had also met with PW2 over the sale of his shares and the matter of Dato' Seri Dr Mahathir or UMNO's involvement must also have been something that the defendant had become aware of. This is not only significant but telling, as this indicates that all the defendant was really interested in was acquiring the plaintiff's 5% shares in Realmild, period.

[39] Weighing all this material evidence which I have identified, I find that the matters raised by the defendant do not amount to misrepresentation be it fraudulent, negligent or innocent. None of the requisite conditions for proving misrepresentation have been established in the facts of this case. There is also no fraud or mistake. These allegations appear to have been abandoned in favour of misrepresentation. As concluded earlier, the plaintiff's 5% shares were entirely his, personally and fully, to be dealt with in the manner that he saw fit.

Price Of The Shares

[40] Coming now to the issue concerning the price of the shares, it would appear that the critical parts of the statement of claim are paras. 7.1, 7.2 and 7.3 which state:

> 7.1 Defendan telah membuat pembayaran sebahagian ("part payment") terhadap harga jualan untuk Saham-Saham Tersebut, iaitu berjumlah RM5,000,000.
>
> 7.2 Plaintif memplid bahawa bayaran sebanyak RM5,000,000 yang telah dibayar oleh defendan adalah sebahagian daripada harga jualan berjumlah RM15,000,000 dan kesan daripada ini, defendan telah khususnya pada waktu yang material memperakui akan harga jualan sebanyak RM15,000,000 dan baki yang masih terhutang sebanyak RM10,000,000.
>
> 7.3 Lanjutan daripada itu defendan telah menandatangani satu surat perakuan keberhutangan ("Acknowledgment of Indebtedness") yang bertarikh 19 July 1999 yang mana isi kandungannya menyatakan bahawa defendan mengakui dan mengesahkan bahawa beliau adalah terhutang kepada plaintif untuk wang berjumlah RM10,000,000.

[41] In the matter of the price of the shares, the defence is that the agreed price was RM10 million and not RM15 million as claimed. The defendant claimed that this was proved by the payment of RM5 million on 1 August 1999, a date which must be construed as evidencing the first payment due under the letter of acknowledgment of indebtedness dated 19 July 1999. The first instalment was due before or on 2 August 1999 while the second instalment was to be settled within 30 days from 18 July 2000.

[42] Since this is an oral contract, the oral testimonies of both parties must be carefully weighed against any contemporaneous document available in court in ascertaining what was the price agreed between the parties - *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119. But, first, it would helpful to set out the contents of the letter of 19 July 1999 where the defendant acknowledged his indebtedness to the plaintiff so that the defendant's argument here can be better understood:

> Yang Bhg Dato' Khalid bin Haji Ahmad
> No. 49, Jalan SS19/4E
> Subang Jaya
> 47500 Petaling Jaya
> Selangor Darul Ehsan
>
> 19th of July 1999
>
> Yang Bhg Dato' Abdul Rahman bin Maidin
> No. 30, Jalan SS19/1A
> Subang Jaya
> 47500 Petaling Jaya
> Selangor Darul Ehsan
>
> Dear Dato'
>
> **Re: Acknowledgment of Indebtedness**
>
> I, Abdul Rahman bin Maidin (NRIC No. 460928-07-5489) hereby acknowledge and confirm that I am indebted to you in the total sum of Ringgit Malaysia Ten Million (RM10,000,000.00) only.
>
> I hereby agree and undertake to settle the said sum of Ringgit Malaysia Ten Million (RM10,000,000.00) free of interest by way of two (2) payments, the first of such payment in the sum of Ringgit Malaysia Five Million (RM5,000,000.00) only shall be payable within fourteen (14) days from the date hereof and the balance in the sum of Ringgit Malaysia Five Million (RM5,000,000.00) only within thirty (30) days after the period of twelve (12) months from the date hereof.

I further confirm that this letter and its contents constitute a valid and legally binding obligation. A

Thank you

Yours Sincerely

Sgd
....
Dato' Abdul Rahman Bin Maidin

I, Khalid bin Haji Ahmad hereby acknowledge the terms of the abovesaid settlement and hereby accept the same B

Sgd
...
Dato' Khalid Bin Haji Ahmad C

[43] Having looked at the contents of this letter, I agree that it is capable of the meaning suggested by the defendant. Nevertheless, the plaintiff had explained that this letter of acknowledgement of indebtedness was actually pre-drafted by the defendant's lawyers. This is confirmed by the defendant although he said it was at the plaintiff's request. D The plaintiff further informed the court that the defendant was supposed to give the plaintiff a personal note on the additional RM5 million since the letter of acknowledgement was only for RM10 million. That however, did not materialise. The plaintiff did not press for that personal note when the defendant made the first payment of RM5 million. When E the defendant failed to make payments for the balance sum, the plaintiff tried "many times" to communicate with the defendant. There is no evidence adduced by the defendant to rebut the matters raised. I find the explanations of the plaintiff with regard to the letter of acknowledgement of indebtedness and his subsequent action and conduct F in relation to collecting the balance from the defendant both adequate and reasonable.

[44] Further, there were several opportunities available to the defendant to either refute or correct the matter of the price of the shares, if indeed the price was in dispute in the first place. There is the defendant's own G letter dated 8 January 2002 to the then Prime Minister referred to earlier. Nowhere in this letter has the defendant raised any complaint over the price of the shares. Similarly, he did not correct the amount representing the price when he was presented again with another window of opportunity - when the plaintiff wrote to the then Prime Minister on H 17 July 2002 to clarify the position on various matters. In that letter, the plaintiff informed the Prime Minister that the defendant had paid him RM5 million in July 1999 for the sale of the plaintiff's personal shares in Realmild and that the balance sum of RM10 million was still outstanding. There is no evidence of any response from the defendant I on this. He appears to have remained silent. Then, there is the plaintiff's

letter also dated 17 July 2002 to the defendant where he went at length to discuss the circumstances of his involvement in Realmild. The plaintiff concluded this letter in the following terms:

> I hope this letter touches the kindest part of you to encourage you to give me the balance of my money that you had promised the soonest possible.
>
> I hope this letter is persuasive enough for you to finally fully settle your side of the deal.

[45] Aside from those letters are three other handwritten letters by the plaintiff dated 27 September 2000, 12 October 2000 and 24 May 2001 before the plaintiff's solicitors' letter of demand dated 9 September 2004. Although the letter dated 12 October 2000 did not specify the sum, it can be inferred to refer to the balance sum of RM10 million. All these letters consistently sought payment of the balance sum of RM10 million. Yet again, the defendant chose to remain silent on the price or on any of the other matters. The price of the shares is a critical element of the agreement and it would be fair and reasonable to expect the defendant to act with reasonable promptitude to correct such a significant difference in the amount. The failure to do so and the deafening silence operate against the defendant giving thereby credence to the plaintiff's suggestion that this argument is more of an afterthought. In my judgment, there is more than sufficient cogent evidence to support the plaintiff's contention that the price for his 5% shares was indeed RM15 million of which only RM5 million had been paid and there was RM10 million still due and outstanding from the defendant.

[46] For all these reasons, I am satisfied that the plaintiff has proven his case on a balance of probabilities while I am not satisfied that the defendant has proved his counterclaim. I therefore allow the plaintiff's claim and dismiss the defendant's counterclaim. Both counsel have proposed a sum of RM70,000 as suitable costs. Having regard to the issues raised for consideration, the number of witnesses called as well as the length of trial, I agree that this is an appropriate sum. Accordingly, I shall only award one order of costs of RM70,000 to the plaintiff.